IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1752

SOL RAUCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Sol Rauch, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 13, 1978. Thereafter a motion to reargue was denied on May 10.

Opinions Below

The opinions of the Court of Appeals [not yet reported], appear in Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on April 13, 1978. This petition for certiorari was filed within thirty days from May 10, the date of the denial of a motion to argue. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

In affirming the conviction of the petitioner, Sol Rauch, the Court of Appeals for the Second Circuit has found harmless error existed in the District Court record. The questions arising therefrom are:

First, whether petitioner was brought to trial on the basis of an indictment which was substantively amended by the United States Attorney and the court;

Second, whether the petitioner was denied due process when his credibility was singled out and emasculated by instructions that he has a "strong motive to lie," and reasonable doubt "is not sympathy for a defendant," or, "an excuse to avoid the performance of an unpleasant duty," or, doubt beyond all possible doubt since "few persons, however guilty they might be, would be convicted;"

Third, were the petitioner's rights further violated on the question of his guilt or innocence in aiding and abetting, when the jury was instructed that it was "not necessary for a conviction . . . on any of these counts that you find they did . . . any act necessary to complete the offense;"

Fourth, whether the trial court's refusal to give supplemental instructions, when requested by the jury, as to the meaning of willful and intent as charged in the indictment and the superseding information constituted plain error.

Constitutional and Statutory Provisions Involved

Constitutional Provisions involved are the 5th and 6th amendments to the United States Constitution. Statutory Provisions involved are Title 18 United States Code § 2 and 1341, Title 15 United States Code § 77q(a) and 77x and Federal Rules of Criminal Procedure Rule 7(e), 30 and 52 (b). They are printed in appendix A *infra*.

Statement of the Case

Petitioner, an attorney who chose to ignore the old adage that an attorney who represents himself has a fool for a client, demonstrated in the pre-trial and trial records his passing familiarity with trial practice or criminal law. Unfortunately, his ineptitude was complemented by Counsel for the co-defendants, his son, Marc Rauch, and his son-in-law, Lawrence Corsa, who felt some obligation to admit to the court his inability and lack of preparation to cross-examine the government's sole expert and who was compelled to make a successful application to permit one of his clients, Marc Rauch, a young man without legal training, to conduct what could have been a meaningful cross examination if it had been conducted with rudimentary skill.

Petitioner, together with his co-defendants, Marc Rauch, Lawrence Corsa, and Marvin Urban, was indicted by a grand jury in the Eastern District of New York. Counts 1 through 10 of the indictment alleged violations of Title 18 U.S.C., §§ 2 and 1341. Counts 11 through 15 alleged violations of Title 18 U.S.C., § 2 and Title 15 U.S.C. §§ 77q (a) and 77x (A41-48). The petitioner was never and has never been convicted on this accusatory document, which was dismissed after the petitioner's conviction on a purported superseding information which was brought in the names of both the United States Attorney and the Grand Jury (A49-54).

On March 1, 1977, on the eve of the trial which commenced on March 14, 1977, the District Court at a pre-trial conference counselled and urged the petitioner to consent to trial on a superseding information on the ill-founded opinion that the deletion of allegations as to securities in counts 11 through 15 would simplify the trial and not produce prejudice to the petitioner (A30-36). The court erroneously concluded that mail fraud under Title 18

U.S.C. 1341 was a lesser included offense in securities violation under Title 18 U.S.C. §§ 77q(a) and 77x. This was done at the urging of the court by the Assistant United States Attorney, who had initially expressed doubt as to the propriety and legality of the court's advice, in order to facilitate the introduction of government evidence on counts which concededly might well have been dismissed at the completion of people's case (A31). The result was a consent by the petitioner to a superseding information while the indictment remained as an accusatory document. The Assistant United States Attorney's document which was given to the petit jury (A21-22) amended the indictment without re-submission to the grand jury in the name of the Grand Jury (A50).

The petitioner was tried for his alleged acts with "Federal Coin Reserve, Inc.," (hereinafter referred to as "FCR"), a New York corporation which purchased and sold rare coins for investment purposes by use of the mails and telephone. "FCR" had been organized as an offshoot of a Hartford Chemical Corporation. It was operated by one Herman Weinstein, deceased as of the time of trial, and Paul Lipton, who prepared one of the principal exhibits, a white "FCR" brochure, marked Government Exhibit I. In November 1973, Mr. Weinstein resigned.

In November 1973, Marc Rauch and Lawrence Corsa became associated with "FCR". From that time until December 12, 1974, the operations were handled exclusively by these individuals. The petitioner did not participate in the formation of "FCR" or the transfer of its stock. During this period the petitioner, who never had a financial interest in nor was a director, officer or employee of "FCR," testified that he was engaged in the affairs of another corporation, although he did assist his son and son-in-law as a fund raiser, father and attorney.

The petitioner was convicted on counts 1 through 6 and 8 through 15. Count 7 was dismissed since the prosecution's

witness failed to appear. Strangely, although the docket reflects a conviction on count 3, the jury was polled for its verdict on each count submitted to it according to the transcript, except count 3 for which the stenographic record is silent as to the jury verdict or a poll.

Petitioner was sentenced to three years confinement and a $1,000 fine on each count, excepting count 7.

On April 13, 1978, the United States Court of Appeals for the Second Circuit denied petitioner's appeal. On May 10, 1978, the Court of Appeals denied the petitioner's motion to recall and vacate the mandate of arrest.

Reasons for Granting the Writ

I

The Court of Appeals' determination that the substitution of an information for and instead of a true bill is harmless error is contrary to the traditional principles applied by this Court and in other circuits.

Rule 7(e) of the Federal Rules of Criminal Procedure appears to permit only an amendment of an information, as evidenced by the following:

> "(e) Amendment of Information"
> "The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and substantial rights of the defendant are not prejudiced."

It is presently generally agreed, however, that an amendment to an indictment as well as to an information is permitted when the alteration relates to matters of form rather than substance. *United States* v. *Cirami*, 510 F.2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (appellants, rather than corporation of which they were officers, stated to

owe tax); *Heisler* v. *United States,* 394 F.2d 692 (9th Cir. 1968), cert. denied, 393 U.S. 986; *Dye* v. *Sacks,* 279 F.2d 834 (6th Cir. 1960) (mis-description of robbery victim's name); *Williams* v. *United States,* 179 F.2d 656 (5th Cir. 1950), aff'd, 341, U.S. 97, (misnamed co-defendant and employer for which crime was committed); *United States* v. *Denny,* 165 F.2d 668 (7th Cir. 1947), cert. denied, 333 U.S. 844 (name of defendant misspelled).

The crucial question here is whether allowing an amendment of an indictment by way of a superseding information in the name of the grand jury which alters the crimes charged is permissible. The grand jury returned a true bill against the petitioner, Sol Rauch, Marc Rauch, Lawrence Corsa, Marvin Urban, a/k/a "Marty Gordon."

The superseding information naming Urban, a/k/a Gordon, as a co-defendant on all counts, was before the court on the trial of the petitioner in spite of the fact that: (1) on February 23, 1977 the court granted Urban a severance as a defendant on the indictment; (2) Urban never consented to an alteration of the indictment; (3) a postal inspector testified as to crucial and damaging representations made to her by Urban; (4) the court and the prosecutor knew that the jury would have to be instructed not to consider the innocence or guilt of Mr. Urban.

The effect of the Court of Appeals decision is to dispense with the underlying principle that an indictment may not be amended except by re-submission to the grand jury, unless the change is merely a matter of form. *Ex-parte Bain,* 121 US 1; *United States* v. *Norris,* 281 US 619; *Sitrone* v. *United States,* 361 US 212; *Russell* v. *United States,* 369 US 749.

Although there are mutual elements of proof in Title 15, U.S.C. §§ 77(q)a and 77x and in Title 18, U.S.C. § 1341 cases, there is one element in § 77(q)a which is not present in § 1341—the offer or sale of a security. *United States*

v. *Bruce,* 488 F.2d 1224, 1230 (5th Cir. 1973). The purpose of a requirement that there be use of the mails or other facilities of commerce is solely to create a basis for federal jurisdiction under § 77(q)a. The crimes differ in spite of mutual elements. *United States* v. *Cashin,* 281 F.2d 669, 673-674 (2d Cir. 1960). This is one true test as to whether an amendment of an indictment affects form rather than substance. *United States* v. *Owens,* 334 F.Supp. 1030 (D. Minn., 1971).

An additional test to protect the petitioner's rights is to determine whether an amendment to the indictment is prejudicial. The test used in determining possible prejudice is:

> ". . . whether a defense under an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other." *United States* v. *Fawcett,* 115 F.2d 764, 767 (3d Cir. 1940).

An indictment may not be materially amended, even *with* the consent of the petitioner. *Carney* v. *United States,* 163 F.2d 784, 789 (9th Cir. 1947).

It is the settled rule in federal courts that an indictment may not be materially amended.

> "To allow the prosecutor or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which

indicted him." (citing Orfield, Criminal Procedure from Arrest to Appeal, 243).

Russell v. *United States,* 369 U.S. 749.

The counts of this indictment related to infamous, but not capital, criminal acts and hence required an indictment, absent an intelligent waiver (Fed.R.Crim.Proc. 7(b)). But even in cases where the prosecutor could have proceeded initially by information, but chose to present the case to a grand jury, he is bound by the grand jury procedure thereafter and may not amend without re-presentment to the grand jury. The prosecutor has gained the advantage of a grand jury proceeding in using its subpoena powers and the petit jury was made aware of the fact of an indictment, which is a subtle stigma upon a defendant. *United States* v. *Fischetti,* 450 F.2d 34 (5th Cir. 1971) cert. den. 405 U.S. 1016; *United States* v. *Goldstein,* 502 F. 2d 526 (3rd Cir. 1974). The jury was aware of this stigma since they were given a copy of the superseding information during their deliberations.

The attempted amendment of the indictment was jurisdictional and may be raised at any time. *Ex parte Bain, supra.*

On March 1, 1977, the Court was informed that substantial scores of exculpatory documentary and testimonial evidence was available to the defense on the question of an investment contract or a securities fraud (A32). The amendment of the indictment subsequently prevented the petitioner of the benefit of introducing his defense which, even by the admission of the Assistant United States Attorney (A31), would be at least partly successful in the eyes of the jury. It also altered the rules governing the admissibility of evidence, substantially altering on the eve of trial the petitioner's entire defense and precluded the submission of evidence of petitioner's overwhelming innocence on the entire indictment.

The action of the Court amending the indictment in violation of petitioner's right requires a granting of certiorari.

II

Petitioner was denied due process when his credibility was singled out and emasculated by instructions that he has a "Strong Motive to Lie." and reasonable doubt "Is Not Sympathy for a Defendant," or, "An Excuse to Avoid the Performance of an Unpleasant Duty," or, doubt beyond all possible doubt since "Few Persons, However Guilty They Might Be, Would be Convicted."

The court charge does not define reasonable doubt in terms of an "abiding belief." The court defines reasonable doubt in terms of an "abiding conviction." The term, "conviction," instead of, "belief," is employed with a sufficient degree of regularity (A-13) as to taint the charge and establish a consistent theme.

The court charged that reasonable doubt "is not caprice, whim, speculation, conjecture or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant." (A-13)

A similar charge was given in *United States* v. *Barrera,* 486 Fed. 2d 333, 339 (2nd Cir. 1973) and *United States* v. *Magnano,* 543 F.2d 431, 436, fn.4 (2nd Cir. 1976); cert. denied, 429 U.S. 1091, with one substantial difference. The *Barrera* court employed the expression, "nor is it sympathy for any party." The *Magnano* court employed the expression "it is not sympathy for a defendant or a desire to uphold the government."

The court below has singled out the defendant. This act has been held to be error. *United States* v. *Cummings,* 468 F.2d 274 (9th Cir. 1972), *United States* v. *Urbanis,* 490 Fed. 2d 384 (9th Cir. 1975), cert. denied 416 U.S. 944.

The court's error in its reasonable doubt charge is further compounded by its statement that: ". . . reasonable

doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty they might be, would be convicted. Since it's practically impossible for a person to be absolutely and completely convinced of any controverted fact . . ." (A-13). This language, "Few persons, however guilty they might be, would be convicted," has been held to be prejudicial error. *United States* v. *Bridges,* 499 F.2d 179 (7th Cir. 1974), cert. denied 419 U.S. 1010.

The court's charge on reasonable doubt when taken as a whole, although similar to that in *United States* v. *Magnano, supra,* more than slightly favors the government. The charge when taken in its entirety is highly prejudicial to the petitioner, for later in the charge on credibility the jury was instructed that the "defendant has a strong motive to lie." (A-18-19) This is the reverse of *Cupp* v. *Naughten,* 414 U.S. 141. It is ever more damaging and a greater ground for certiorari than a charge that every witness is presumed to speak the truth.

III

The Petitioner's rights were further violated on the question of his guilt or innocence in aiding and abetting, when the jury was instructed that it was "Not Necessary for a Conviction . . . on Any of these Counts that You Find They did . . . Any Act Necessary to Complete the Offense."

The crime of aiding and abetting requires a specific intent. A conviction may not be supported where a specific intent charge has been omitted. *United States* v. *Bryant,* 461 F. 2d 912 (6th Cir. 1972). Under aiding and abetting the trial court gave no specific charge as to a specific intent.

The court erroneously charged the jury that:

> ". . . therefore, it is not necessary for a conviction of a defendant on any of these counts that you find they did every or any act necessary to complete the offense." (A15)

Aiding and abetting requires an affirmative act. It differs from conspiracy in that the essence of aiding and abetting is participation while the essence of conspiracy is agreement. *United States* v. *Varelli,* 407 F. 2d 735 (7th Cir. 1969). The court's charge as given is a conspiracy charge, since it does not require any act necessary to make the venture succeed. Judge Learned Hand, in *United States* v. *Paoni,* 100 F. 2d 401, 402 (2d Cir. 1938), stated that the crime of aiding and abetting requires that the defendant, "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." For this reason, the court's charge that the defendant need not perform *any act* to complete this offense is erroneous and permitted a conviction without proof of the elements of the crime.

IV

The Court of Appeals for the Second Circuit is in Conflict with the holdings of this Court and the Fifth, Ninth and D.C. Circuits in finding harmless error when it affirmed the District Court's refusal to discharge its obligation to respond to a request from the Jury for further instructions concerning an essential element of the crime charged.

In every criminal case, it is incumbent upon the government to prove every essential element of the offense charged, and the petitioner is entitled to acquittal unless the government establishes his guilt beyond a reasonable doubt. This places a burden not only upon the government, but also upon the court. The court's burden is to instruct the jury on the law to be applied on the evidence adduced at trial. The court can only discharge this duty by carefully instructing the jury on the law and

in not permitting a troubled jury to rely on a layman's interpretation of superficially simple, but actually difficult legal issue as to whether the petitioner did " . . . knowingly and willfully . . . devise and intend to devise . . . a scheme and artifice to defraud." *United States* v. *Bolden,* 514 F.2d 1301, 1309 (D.C. Cir. 1975); *Powell* v. *United States,* 347 F.2d 156 (9th Cir. 1965); *Bland* v. *United States,* 299 F.2d 105 (5th Cir. 1962).

A proper discharge of the jury's responsibility directly depends upon the proper discharge of the judge's duty to give the jury the required guidance by a lucid statement of the relevant legal criteria for determining a defendant's guilt or innocence. When a jury makes explicit its difficulties, a trial judge must clear them away with concrete accuracy.

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." *Bollenbach* v. *United States,* 326 U.S. 607, 612 (1946)

See also, *United States* v. *Miller,* 546 F.2d 320 (9th Cir. 1976); *United States* v. *Bolden, supra; Wright* v. *United States,* 250 F.2d 4 (D.C. Cir. 1957).

In this case, the court charged the jury on Friday afternoon, April 8, 1977, after which it retired to deliberate at 3:35 P.M. (A19). One hour and forty-five minutes later, at 5:20 P.M. the jury requested, in writing, additional instructions (A19). Initially the court experienced difficulty in reading the jury's handwriting beyond the word "willfully" (A20), and summoned the jury to the courtroom at 5:25 P.M. when the court was told that the jury was confused on "knowingly and willfully devise and intent to devise" (A21). The jury informed the court that it required a definition of the terms "willful and intent" within the context of the

superseding information. The prosecutor, counsel for the co-defendants, and this petitioner requested that the court issue charges responsive to the jury's inquiry (A23-24).

The court agreed to furnish the jury with additional instructions (A24), but postponed its instruction and recessed at approximately 5:32 P.M. until 9:00 A.M. on Monday, April 11 (A25). The jury received no admonition against attempting to define or interpret on their own, those elements of the crime during the course of the weekend recess or at any other time (A25).

At 9:00 A.M. on Monday, April 11, the court, upon reconvening, decided that it had again become confused as to the jury's request and decided not to answer the jury's question in its "present form" (A25-26), despite the unequivocal explanations by jurors one and five on the previous Friday afternoon as to the meaning of their inquiry (A21-22). Instead, the court instructed the jury to restate its request in writing, after which it was instructed to continue deliberations (A25). The court reconvened at 2:00 P.M. when the jury requested the Court to "forget our request for explanation . . ." and thereupon, promptly returned with a verdict of guilty against the defendants on the Superseding Information (A26, 27).

Prior to the verdict, the petitioner requested that the court ascertain the details of the jury's withdrawal of its request. The court denied the application (A27).

The law is clear that the decision whether and how to reinstruct a jury is within the sound discretion of the court. Of necessity there are limitations and restrictions on the exercise or refusal to exercise that discretion.

The judge in the instant case did not attempt either to give a supplemental charge or take any steps to ascertain whether the jury understood or had proper knowledge of the relevant legal criteria to apply in its deliberations. A

trial judge has ". . . no business to be 'quite cursory' . . ." in circumstances where the jury asked for supplemental instruction. *Bollenbach* v. *United States, supra.*

Apropos of this situation are the comments of the 5th Circuit in *Bland* v. *United States, supra,* at p. 509:

> "It would strain credulity to suppose that the original instructions of four hours earlier, explaining the statutory elements of guilt, and adding the additional requisites of knowledge and intent, were still fresh in the minds of twelve lay jurors. If their minds needed refreshing as to the terms of the statute, it is an inference so strong as to be conclusive, that the further instructions, explaining that knowledge must be proved, and raising the sole factual issue still in doubt under the evidence, had also by then completely gotten out of the minds of the jurors. The defendants were effectively stripped of their sole defense and conviction became a foregone conclusion.
>
> It is not beside the point to suggest that lawyers and judges, trained to follow language closely and to draw close distinctions as to its meaning, would themselves be at a complete loss to remember modifications of a forgotten rule of law. This, in essence, is the impossible task expected of twelve untrained laymen here. The fatal flaw is obvious and needs no further belaboring. The judgment must be reversed and remanded for this reason."

An appellate court may not substitute its judgment for that of a jury. The Supreme Court in *Bollenbach* v. *United States* clearly stated, at p. 615:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

The jury here clearly requested the express legal criteria necessary for its deliberation. This criteria was not forthcoming from the court. No attempt was made to ascertain whether the jury understood, had or was employing the correct legal criteria for its deliberations in determining willfullness and/or intent as charged in the "superseding information" and/or indictment. This is plain error requiring a reversal.

Under F.R.Crim.P.52(b) the court may notice plain error in charges even despite failure to comply with F.R.Crim. P.30. *Powell* v. *United States,* supra; *United States* v. *Fields,* 466 F.2d 119, 121 (2nd Cir. 1972). The Court of Appeals for the Second Circuit is in conflict with the holdings of this court and the Fifth, Ninth and D.C. Circuits in finding harmless error when it affirmed the District Court's refusal to discharge its obligation to respond to a request from the jury for further instructions concerning an essential element of the crime charged. A writ of certiorari should therefore issue to insure the due process of law under the Fifth Amendment of the Constitution effectively denied petitioner, and to enable this court to promulgate current guidelines to assure due process in criminal actions when a jury requests clarification of a court's charge.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX A—Statutes.

Rule 30 RULES OF CRIMINAL PROCEDURE

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.
As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 52 RULES OF CRIMINAL PROCEDURE

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Notes of Advisory Committee on Rules

Note to Subdivision (a). This rule is a restatement of existing law, 28 U.S.C.A. former § 391 (second sentence): "On the hearing of any appeal, certiorari, writ of error,

or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties"; 18 U.S.C.A. former § 556: "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. * * *." A similar provision is found in rule 61 of the Federal Rules of Civil Procedure, 28 U.S.C. Appendix.

Note to Subdivision (b). This rule is a restatement of existing law, Wiborg v. United States, 16 S.Ct. 1127, 1197, 2 cases, 163. U.S. 632, 658, 41 L.Ed. 289; Hemphill v. United States, 112 F.2d 505, C.C.A.9th, reversed 312 U.S. 657, 85 L.Ed. 1106, 61 S.Ct. 729, conformed to 120 F.2d 115, certiorari denied 62 S.Ct. 111, 314 U.S. 627, 86 L.Ed. 503. Rule 27 of the Rules of the Supreme Court, 28 U.S.C., formerly following § 354, provides that errors not specified will be disregarded, "save as the court, at its option, may notice a plain error not assigned or specified." Similar provisions are found in the rules of several circuit courts of appeals.

Rule 7 RULES OF CRIMINAL PROCEDURE

Rule 7. The Indictment and the Information

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it

may be prosecuted by information. Any other offense may be prosecuted by information or by indictment. An information may be filed without leave of court.

[1] **(b) Waiver of Indictment.** An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by refeernce in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means, The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) Criminal Forfeiture. When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

(3) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972.

18. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct 31, 1951, c. 655, § 17b, 65 Stat. 717.

18 § 1306 CRIMES AND CRIMINAL PROCEDURE
CHAPTER 63.—MAIL FRAUD

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, repre-

sentations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-376, § 6(j) (11), 84 Stat. 773.

APPENDIX B—Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 744, 773, 774 September Term 1977

Argued: March 13, 1978 Decided: April 13, 1978

Docket Nos. 77-1311, 77-1312, 77-1321

UNITED STATES OF AMERICA,

Appellee,

—against—

SOL R. RAUCH, MARC RAUCH and LAWRENCE CORSA,

Appellants.

Before MULLIGAN and GEWIN,* *Circuit Judges*, and MILLER,** U.S. Court of Customs and Patent Appeals.

Appeal from a judgment of the United States District Court for the Eastern District of New York convicting appellants, after a jury trial before George C. Pratt, *Judge*, of 14 counts of mail fraud, in violation of Title 18 U.S.C. §§ 1341 & 2.

Affirmed.

JOSEPH P. HOLT, Esq., New York, N.Y. (Brady, Tarpey, Hoey, New York, N.Y., Michael W. O'Sullivan, Richard D. Furlong, New York, N.Y., of counsel), *for Appellant* (S. Rauch)

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* Of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

** Of the United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

DONALD E. NAWI, Esq., New Rochelle, New York, *for Appellant* (M. Rauch) JACK KAPLAN, Esq., New York, N.Y. (Peter J. Romatowski, Jonathan D. Britt, Carter, Ledyard & Milburn, New York, N.Y. of counsel), *for Appellant* (L. Corsa)

GARY A. WOODFIELD, Special Assistant to the United States Attorney, New York, N.Y. (David G. Trager, United States Attorney for the Eastern District of New York, Harvey M. Stone, Thomas D. Sclafani, Assistant United States Attorneys, of counsel), *for Appellee.*

PER CURIAM:

Appellants Sol R. Rauch, his son Marc Rauch, and his son-in-law Lawrence Corsa, were jointly tried and convicted by a jury of 14 counts of mail fraud. Their convictions arose out of the operation of a mail order business, Federal Coin Reserve, Inc., which sold rare coins for investment purposes. Marc Rauch was president of the company, Lawrence Corsa was vice-president, and Sol Rauch was its attorney.

On appeal each defendant specifies a number of errors, some of which are similar, which they contend require reversal of their convictions: (1) the evidence was insufficient; (2) the charge to the jury was inadequate; (3) a conflict of interest occurred when counsel for Marc Rauch and Lawrence Corsa assisted the pro se defense of Sol Rauch; (4) the court failed to designate regular and alternate jurors until the end of trial; (5) there was prosecutorial misconduct; (6) requested instructions were not given; (7) the trial court "coerced" Corsa into waiving indictment and proceeding by information; (8) the court improperly

amended the indictment; and (9) the judge made erroneous evidentiary rulings.

We have examined the briefs and the record and given close attention to appellants' claims at oral argument but conclude that no error requiring reversal was committed. "A defendant is entitled to a fair trial but not a perfect one." Lutwak v. United States, 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593, 605 (1953). While the evidence against each party was not of equal weight, there was sufficient evidence as to each appellant to support the jury's verdict.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-eight.

Present: HONORABLE WILLIAM H. MULLIGAN
HONORABLE WALTER P. GEWIN
Circuit Judges
HONORABLE JACK R. MILLER
District Judge

77-1311

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SOL RAUCH,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant Sol Rauch
Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX C—Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of April, one thousand nine hundred and seventy-eight.

Present: HON. WILLIAM H. MULLIGAN

HON. WALTER P. GEWIN
Circuit Judges

HON. JACK R. MILLER
U.S. Court of Customs and Patent Appeals

77-1311

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SOL RAUCH,
MARC RAUCH,
LAWRENCE CORSA,
Defendants,

SOL RAUCH,
MARC RAUCH,
LAWRENCE CORSA,
Defendants-Appellants.

Appendix C—Judgment of the Court of Appeals.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER
Deputy Clerk

APPENDIX D—Pertinent Portions of the District Court Charge.

My function now is to instruct you as to the law and it is your duty to accept these instructions as to the law and to apply them to the facts as you may find them. With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel, either for the Government or the defense, may have said with respect to matters in evidence, whether during the trial, in a question, in argument, or in summation, is not to be substituted for your own recollection of the evidence.

So, too, as to any matter in evidence, anything that I may have said during the trial or may refer to in the course of these instructions is not to be taken in place of your own recollection.

The information in this case is merely an accusation, a charge. It is not evidence of the defendants' guilt. Since the defendants have pleaded not guilty, the Government has the burden of proving the charges against the defendants beyond a reasonable doubt. A defendant does not have to prove his innocence. On the contrary, each defendant is presumed to be innocent of the accusations contained in the information.

This presumption of innocence was in their favor throughout the entire trial. It continues in his favor—in their favor even as I instruct you now and it remains in their favor during the course of your deliberations in the jury room. The presumption of innocence is removed as to a defendant only if and when you are satisfied that the Government has sustained its burden of proving the defendants guilty beyond a reasonable doubt. If the Government has failed to sustain its burden as to a defendant, then the presumption of innocence alone is sufficient to acquit him.

I have used the term "reasonable doubt". What is a reasonable doubt? The words almost define themselves;

that there is a doubt founded in reason and arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is a doubt which appeals to your reason, to your judgment, to your common sense and your experience. It is not caprice, whim, speculation, conjecture or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say you are not satisfied of the guilt of a defendant; that you do not have an abiding conviction of his guilt; in sum, if you would have such a doubt as would cause you as prudent persons to hesitate before acting in matters important to yourselves, then you have a reasonable doubt. In that circumstance, it is your duty to acquit.

On the other hand, if after such an impartial and fair consideration of all the evidence, you can candidly and honestly say you do have an abiding conviction of the defendants' guilt—of a defendant's guilt—such a conviction as you would be willing to act in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt and under such circumstances, it is your duty to convict.

Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty they might be, would be convicted. Since it's practically impossible for a person to be absolutely and completely convinced of any controverted fact, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Now is it the Government's burden to prove each and every bit of evidence to be true beyond a reasonable doubt.

Its burden is to prove beyond a reasonable doubt each and every essential element of the crime charged. I will say more about the essential elements of these crimes in a moment.

Reasonable doubt may arise from the failure of the Government to produce evidence. A defendant is not obligated to present evidence in his favor. He has the right to rely on the failure of the Government to prove its case. He may also rely on evidence brought out on cross-examination of witnesses called by the Government.

On the other hand, a defendant has the power to subpoena anyone in support of his position if he chooses, and he may exercise that power if he chooses.

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Now, you will recall that I said earlier that there were two sections of the law that the defendants are charged with violating. The first was the mail fraud statute, Section 1341 which we have already discussed.

The other section which you must consider is Section 2 of Title 18, which pertains to persons who aid and abet others in the commission of a crime. Section 2 reads, insofar as pertinent here, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

Whereas in the present case two or more persons are charged together with the commission of an offense, the Government is not required to prove that one of the defendants alone did all of the things required to make out the offense. On the contrary, under Section 2, Title 18, all those who aided and abetted in the commission of an offense or caused an act to be done which if directly performed would be an offense, are treated as equally guilty of the crime. That is, they are punishable as principal offenders.

Hence, if a person voluntarily unites his efforts with one or more others to bring about the commission of a crime, he is equally guilty with the others and they with him, provided that he is conscious of the nature of the criminal venture and intentionally associates himself in its furtherance and actively participates in bringing about accomplishment of the criminal venture.

Keep in mind, however, that mere association is not a crime. There is no such thing under our laws as guilt merely by association. The mere presence of a defendant where a crime may have occurred, even coupled with that defendant's knowledge that a crime is being committed, or the mere negative acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is insufficient to establish guilt.

An aider and abettor must have some interest in the criminal venture. In order to convict a defendant, you must be convinced beyond a reasonable doubt that he voluntarily and intentionally participated in a criminal venture, in an effort to make it succeed. The Government does not contend and is not required to prove that each and every defendant personally employed a device, scheme or artifice to defraud. Therefore, it is not necessary for a conviction of a deefndant on any of these counts that you find that he did every or any act necessary to complete the offense. Anyone who aided or abetted another person to commit an illegal act is himself guilty of committing that illegal act.

While there is no precise rule as to what acts constitute aiding and abetting, it is enough that a defendant in some way associate himself with the criminal venture and that he participate in it as in something he wishes to bring about or, in other words, that he seeks by his action to make it succeed.

With respect to each charge—each criminal charge against a defendant, the Government must prove every element of the crime charged beyond a reasonable doubt. If the Government fails as to any element, you must acquit. The fact that one element of the crime may or may not exist, has no bearing upon any other element. If you conclude that one element of the crime has been established, you may not infer solely from the existence of that element the existence of any other element of the crime. If any element of the crime has not been established as to a defendant beyond a reasonable doubt, your verdict as to that crime must be not guilty.

On the other hand, you must convict the defendant if as to him each of the elements of the crime has been proved beyond a reasonable doubt.

A difficult aspect of any jury's duty is to determine the credibility of the witnesses and to weigh their testimony. You, the jurors, are the sole judges of the credibility of the witnesses. Credibility refers to the believability of their testimony and the weight their testimony deserves. Your determination of the issue of credibility very largely must depend upon the impression that a witness makes upon you as to whether or not he is telling the truth or giving you an accurate version of what occurred.

When you come into the Courtroom here and sit in the jury box, while the trial is going on, when you are deliberating in the jury room, you have your common sense, your good judgment and your experience with you. You decide whether or not a witness is straightforward and truthful, whether he attempted to conceal anything, whether the witness has motive to testify falsely, whether there is any reason why a witness might color his testimony. In other words, what you try to do, to use the vernacular, is to size the person up just as you would do in any important

matter where you were undertaking to determine whether or not a person is truthful, candid and straightforward. Scrutinize the testimony given and the circumstances under which each witness testifies and every matter testified which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, his motive and state of mind, his demeanor and manner while on the witness stand. Consider his ability to observe the matters as to which he testified, whether he should impress you as having an accurate recollection of those matters. Consider the relation which each witness might bear to either side of the case. Consider the manner in which each witness might be affected by the verdict. And the extent to which, if at all, each witness is either supported or contradicted by other evidence, evidence that at some other time a witness has said or done something which is inconsistent with the witness' testimony at the trial may be considered by you for purposes of judging the credibility of that witness.

If adopted by the witness, that is if the witness has admitted before you that he made the prior statement, it may also be used as affirmative evidence in the case. You may also consider the failure of the witness to disclose information on prior occasions when the opportunity to do so presented itself as being inconsistent with that witness' testimony at the trial. Whether a prior statement is inconsistent is a fact question, solely for your determination.

You also determine whether the failure of a witness to reveal information prior to this testifying before you, for example, in reports or in statements he may have made, you determine whether that is inconsistent with his present testimony. In making that determination, you should consider all the facts and circumstances attendant at the time of making the prior statement or the omission of information. In determining whether the prior statement is inconsistent with the testimony given before you, you may take

into consideration the nature of the examination here and the purpose of the statement on the prior occasion.

You may take into consideration normal variations in retelling an event, to determine whether the statements are truly inconsistent or merely a difference in describing an occurrence. It is for you and you alone to determine whether an inconsistency is to a material or an immaterial fact and what effect the inconsistency has on the witness' credibility.

A witness, however, may be inaccurate, contradictory or even untruthful in some respects and yet be entirely credible in the essentials of his testimony.

The ultimate question for you to decide in passing upon credibility is: Did the witness tell the truth here before you as to the essential matters? If you find that any witness, and this applies alike to Government and defense, willfully testified falsely as to any material fact, you have a right to reject the testimony of that witness in its entirety. Or you may accept that part or portion which you believe to be credible.

The fact that some Government witnesses may be Government employees does not entitle their testimony to any greater weight or consideration than that offered to any other witness in the case. You will evaluate their credibility the same way you do that of any other witness.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

Now, the law permits, but does not require, a defendant to testify on his own behalf. Obviously, a defendant

has a deep personal interest as a result of his prosecution. Indeed, it's fair to say he has the greatest interest in the outcome. Interest creates a motive for false testimony and a defendant's interest in the result of his trial is of a character possessed by no other witness. In appraising the credibility of these three defendants who testified here, you may consider that any defendant has a strong motive to lie to protect himself. But you may also consider that he takes a real risk in subjecting himself to cross-examination.

In addition, simply because a person has a vital interest in the end result, it by no means follows that he is not capable of telling a truthful and straightforward story. It is for you to decide to what extent, if at all, a defendant's interest has affected or colored his testimony.

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The Court: Ladies and gentlemen, your oath sums up your duty here; that is, without fear or favor to any man, you will well and truly try the issues between these parties according to the evidence given to you in this Court and the laws of the United States.

You may now retire to the jury room and begin your deliberations.

(Jury leaves the Courtroom.)

The Court: Counsel, Mr. Hertzfeld is going to pull together the exhibits to go into the jury. He may need your assistance in that regard for a few minutes.

(Time noted: 3:35 o'clock p.m.)

(Time Noted: 5:20 p.m.)

(Jury not present)

The Court: Gentlemen, I have a note from the Jury which I believe you have probably seen. It is marked

Court's Exhiibt 11. It says, "Your Honor, can we have a definition of," then in parentheses it says, "willfully," and I just don't know what the next word is. It could be, "enter."

I just can't figure it out. Does anyone have any suggestions?

Mr. Woodfield: You mean as to the interpretation of the word?

The Court: Yes.

Mr. Woodfield: Assuming it is the word "enter" I still have difficulty with it.

The Court: I was wondering if it's from the right Jury.

Mr. Woodfield: I think it is "enter."

Mr. Goldman: There is no question.

Mr. Woodfield: But that doesn't completely resolve it.

The Court: Let's bring in the Jury and talk to the Foreman and see what they have in mind?

Mr. Woodfield: I think it would certainly appear to be an item we discussed. I think it is an item we discussed a long time ago with regard to Mr. Goldman's Charge. That is he made that argument in summation, there has to be a scheme that commenced at a time when these individuals took over the company. I think that may be the area of their confusion.

I think as I said to Mr. Goldman, that is not the law and I thought it would be made clearer in your charge. Now that I think about it, it wasn't.

Mr. Goldman did argue that in summation and that is not law. I believe that a scheme could be devised at any time during the period named in the indictment. Whether or not—the issue is whether or not it was in existence at the time of the mailings and it was in furtherance of it.

The Court: I think they're talking about willfully enter into a scheme, artifice or fraud.

Mr. Goldman: Your Honor, instead of trying to interpret it and discuss what I said on summation, here is a note from the Jury which says they want Your Honor's definition on "willfully enter." Not the reason for their wanting it.

It seems to me, and I respectfully submit that you have now a duty, please forgive me for saying it, you have a duty to give them a definition and before they come in to make up your mind what you shall tell them as to the meaning of the phrase "willfully enter." You are not part of their deliberations, neither am I. Neither is Mr. Woodfield. I think that Mr. Woodfield, if he wants to, should give you his opinion or suggestion as to what you should define it as. Then ask me. Then Mr. Sol Rauch. Then you will make up your mind and tell us what it is so that we can discuss it.

The Court: I think we are speculating as to first what the Jury asked and secondly, even if it does say "willfully enter", we're still speculating as to "willfully enter" what.

Mr. Goldman: It is not our job to speculate on what they think.

The Court: I'm not going to answer questions in a vacuum. I'm going to have to find out what they're talking about. Then if I think I need to further discuss it with you, I will.

Bring in the Jury.

(Jury returns from their deliberations at 5:25 p.m.)

The Court: Ladies and Gentlemen, I have your note which has been marked Court's Exhibit 11. I need some help. Who is your Foreman?

Juror Number One: I am.

The Court: You are Mr. White?

Juror Number One: Yes, Sir.

The Court: It says, "Can we have a definition of willfully," and I can't read the next word.

Juror Number One: It should be willfully intent.

Juror Number Five. Willful intent.

The Court: Is that a term which appears in the information?

Juror Number One: I think it is the second page.

The Court: Paragraph One on Page Two of the information? Under the heading Count One through Five. It says commencing and so fourth and continuing thereafter. The Defendants did knowingly and willfully devise and intend to devise. Is that it?

Juror Number One: That's right.

The Court: Your question is what do the words willfully and intend mean in that context?

Juror Number One: Yes, Sir.

The Court: All right. I'll hold that for a moment. I have to think about it for a bit.

It is now 5:30. We are at a stage of the case where our roles are somewhat reversed. The Jury is pretty much in control from what goes on from here in terms of your deliberation. We will largely be governed by what it is the Jury wishes to do.

We have several possibilities. We can continue deliberations today for as long as you care to deliberate. If you feel you are anywheres near your verdict, you may wish to do that. If you feel that you are not, then you may wish to consider the possibility of recessing.

That raises the question of when we resume. I would not permit you to deliberate on Sunday. But, if you wish to deliberate on Saturday, I will direct that it be done. If you wish to recess until Monday and resume your deliberations at that time, I would permit you to do that.

If your decision with respect to all of that is you wish to stop at this point and resume either tomorrow or Monday, then I would defer answering your question until you start,

so that at least the answer to your question would be fresh in your minds.

If on the other hand, you wish to continue deliberations this afternoon or into the evening, then I will go right to work on what it is you had asked.

If you want to step into the Jury Room and decide what you wish to do with respect to your deliberations?

(Jury excused at 5:30 p.m.)

The Court: Yes, Mr. Woodfield?

Mr. Woodfield: Well, again I realize Your Honor, that in your charge—in your charge, I don't know whether you defined knowingly and willfully. If you Your Honor might consider taking a standard charge on knowingly and willfully from a standard charge or from whatever and give a charge to that effect?

The Court: Voluntarily and intentionally?

Mr. Woodfield: Knowingly and willfully. I think they're all the same. I would say a standard charge on that. I forget exactly what Your Honor stated.

Mr. Goldman: It is the word intent that they asked about.

The Court: I spent about eight pages on intent, which I can read to them.

Mr. Goldman: It's knowingly and intend. That's what they want, knowingly intend.

Excuse me, I mean willful intent. Perhaps, would Your Honor obtain a definition from both sides on that rather than—

Mr. Sol Rauch: May I say something?

Mr. Goldman: In a moment. Rather than rereading something they heard, something seems to be bothering them. Maybe a short definition is what they want.

The Court: That may well be.

Mr. Sol Rauch: I was going to suggest that since everybody seemed to feel that the original charge is—maybe it didn't satisfy everybody, but I think it came very close to even—it was extremely fair. Why not repeat it in reference to those words, that portion of the charge.

Mr. Goldman: Well, I disagree with you. Shall we first find out what they intend to do about the recess?

The Court: That would be an important step here.

Mr. Goldman: Okay, we'll wait. If they intend to deliberate—

The Clerk: They have a note.

(Jury returns to Court Room at 5:32 p.m.)

The Court: What is the Jury's pleasure, Mr. White?

Juror Number One: We feel we cant' make a decision tonight. But we would like to start fresh on Monday morning.

The Court: On Monday morning, all right. Then we will recess at this point until 9 o'clock Monday morning.

At that time I will try to respond to your inquiry. It is particularly important that over the weekend you not discuss this case with anyone and that you not even discuss it amongst yourselves while you are leaving here or when you assemble a little before 9 o'clock on Monday morning. The whole process of Jury deliberations is one in which all 12 of you should be present at all times.

In other words, any thoughts that anyone has and expresses should be shared by all of you. For that reason I ask you not to continue any discussions of the evidence in the case or any other aspect of the case until you come back here Monday morning and I will call you into the Court Room just for the purpose of—first I'll call you in for the purpose of responding to your question. Then you'll resume your deliberations and at that point you can get back to discussing the case.

I hope you all have a nice weekend and I'll see you here Monday morning at 9 o'clock.

(Whereupon, the Jury was excused at 5:35 p.m.)

The Court: What is your pleasure with suggestions to me as to how to respond to this note? Do you want to hash this out at a quarter of nine Monday morning?

Mr. Goldman: Yes, Your Honor.

The Court: All right. We are recessed until then.

Mr. Goldman: A quarter to nine?

The Court: Yes.

Mr. Goldman: Have a nice weekend, Your Honor.

The Court: Thank you. Same to you all.

(Whereupon, Court adjourned until 8:45 a.m. on April 11th, 1977.)

(Time Noted: 9:00 a.m.)

The Court: With respect to this question the Jury asked on Friday, Court's Exhibit 11, I have decided I am not going to try to answer it in its present form. I'm going to turn it back to the Jury and ask them to explain what they want. I think it's speculating too much to try to determine what they really want. The response of the Jury when I questioned them about it on Friday, wasn't consistent. So, I think I will ask them to state more fully in writing what it is they want to know, then we will answer it. Bring in the Jury.

(Whereupon, the Jury entered the Court Room.)

The Court: Good morning, Ladies and Gentlemen. Hope you had a nice weekend.

Back to the question which you asked on Friday, which I have marked Court's Exhibit 11, "Can we have a definition of willfully enter?"

There seemed to be some disagreement as to really what was intended to be asked.

I think before I attempt to answer the question I am going to ask you to go back into the Jury Room, the one in which you were deliberating, and write out a little more fully what it is you really want me to tell you. Then I will be able to respond to it, and there won't be guessing on my part, and you will also have the information that you want. So, if you will go in and do that, I will answer your question as quickly as I can, and then you can proceed with your deliberations.

(Whereupon, the Jury left the Court Room.)

Mr. Goldman: Your Honor?

The Court: Is there something you wanted?

Mr. Goldman: Yes, I may be mistaken. I think you said to the Jury just now "willfully enter." Again, because their note was unsure, you meant willfully intent?

The Court: That's what the Foreman said, but one of the other Jurors said willfully enter. So, that's why I want them to tell me what they want, rather than have us guess.

At 9:30 I am commencing another trial. We will be running the two of them at once, so this one takes priority. When the Jury wants to be heard, I run the other Jury out, and go here. But, there will be other people in the Court Room and lots and lots of files. They say this one will take four weeks too.

(Whereupon a recess was taken at 9:05 a.m.)

(Time Note: 2:00 p.m.)

Mr. Goldman: Your Honor, with reference to Juror Number Three, that woman—

The Court: Yes?

Mr. Goldman: In the event there is a verdict of guilty, you'll want to question her, right?

That's what you agreed upon?

The Court: I said I would at the request of either party.

Mr. Goldman: I would request it.

Now, if you question her, would you question her in Chambers?

The Court: I think so.

Mr. Goldman: It could be that some of the other Jurors might have heard it or—are you going to dismiss the Jury except for her?

Can you hold that Jury until you finish talking with her? You may find it necessary.

The Court: I think probably it might be wise to hold them until we get the matter cleared up.

Mr. Sol Rauch: There had been a request, Your Honor, on Friday for a definition of a word "willfully" or "willfully entered". This morning when His Honor instructed them to return to elucidate on that, I understand they sent a note in to the effect that they had the definition or they had agreed on a definition.

I'm just wondering, Your Honor, if in light of the fact that a weekend went by, Saturday and Sunday, whether it's possible that a definition was obtained from the outside.

Would there be a way to ascertain anything like that?

The Court: First, give me the note. The note they sent marked Government Exhibit 12 says, "Please forget our request for explanation of information. Thank you."

I am not going to inquire as to why they ask me to forget their request of Friday. There are any number of possible explanations and there may be a different explanation in the mind of each Juror.

Bring in the Jury.

(Jury enters the Court Room.)

Appendix D—Pertinent Portions of the District Court Charge.

The Court: Mr. White, I understand the Jury has reached a verdict.

The Foreman: We have.

The Court: Mr. Herzfeld?

The Clerk: Mr. Foreman, Ladies and Gentlemen of the Jury, have you agreed upon a verdict?

Juror Number One: We have.

APPENDIX E—Minutes of Pretrial Conference in Court's Chambers March 1, 1977.

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Another reason that the Keogh Plan assumed great significance at that time in the plans of Federal was that they were moving toward convention business and they were moving toward Keogh Plan business. Both types of business I think are complete and lends substance to what they call security sales and both of them had built into it the inspection of the coins for a greater length of time.

I think for example, Your Honor, the evidence would show that the normal amount of time given to a purchaser in the industry is either 5 or 7 days. A few companies permitted 10 days. Federal Coin had a 15 day inspection. That is the largest in the industry, except there were some companies that permitted you to have unlimited. A minority did exist.

But, with the Keogh Plan, I guess I said just about what I can on that and a great amount of activity went into that.

The Court: Another question on the question of whether we are dealing with the sale of securities or coins with respect to the last five counts of the indictment. Is this a question of fact or is it a question of law?

Mr. Woodfield: May I be heard just briefly on that?

The Court: Yes. You've asked me to charge it as a matter of law.

Mr. Woodfield: Yes, but I'm not so sure. I was going to relay that to your Clerk.

The Court: I have to charge what the law is as to a security and leave it to the Jury.

Mr. Woodfield: Just the other day I was trying to do some further research. I'm not satisfied one way or the other, and I'm still working on it. I intend to satisfy in my own mind what the answer is and when I do I'll certainly supply that to Your Honor and Clerk. I'm not sure on that charge, I have my doubts on it.

Appendix E—Minutes of Pretrial Conference in Court's Chambers March 1, 1977.

I think it may be something similar to a charge with regard to the use of Interstate Commerce, like in the Hobbs Fact Violation; that if you find A, B, C, D, E and F, therefore it is a security. I think the charge I gave you is too much in the conclusionary form. That is my thinking at the moment but I don't have a final opinion.

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Mr. Woodfield: Well, I forget—I'll have to read it. But, as I recall it—one is mail coming from Federal Coin and the other is mail going to Federal Coin.

The Court: I see. But with the same underlying misrepresentations?

Mr. Woodfield: Yes, Your Honor, as well as Count Eleven through Fifteen.

The Court: Those are the security frauds?

Mr. Woodfield: Yes, but the misrepresentations are the same.

The Court: Is it important that all of the security aspect be in the case?

Mr. Woodfield: Is it important?

The Court: Yes.

Mr. Woodfield: Well, not in the sense that Eleven through Fiftten could just have easily been mail counts, if that is the point Your Honor is making?

The Court: I see one of the big issues in the case is whether these are securities or not. Even if they are securities you still come back to the fraud and the same allegation that you have set forth in Paragraph Five. Certainly they were operating by mail.

Mr. Woodfield: Yes.

The Court: Is the penalty significantly different on the securities fraud?

Mr. Woodfield: No, Your Honor, I see the point you are making.

Appendix E—Minutes of Pretrial Conference in Court's Chambers March 1, 1977.

The Court: Why have extra issues for the Jury?

Mr. Woodfield: I made an effort to cut this case down, Your Honor. My thought is only that Counts Eleven through Fifteen were mail counts. I would still want to introduce all fifteen victim witnesses, I think it is important. I certainly have not considered or not introduced all of them and I found I can't and I still want to adequately present the case for the Government.

The next alternative obviously is we can't wave a magic wand and make them mail counts. There are many other alternatives, I could have the count dismissed. In any event I would offer the testimony of those five witnesses as similar acts and in fact at this stage of the case I need those counts, I need those witnesses to testify, so I would say to Your Honor I would like to proceed in the case as it is set out in the indictment and possibily at the end of my case I would consider, if the issue of securities such that it really bogs down the Court's time, possibly not to submit those counts to the Jury. But, in any event, I would want to introduce the testimony.

The Court: Suppose we were to change them with the consent of all the Defendants to just mail fraud counts.

Mr. Woodfield: Well, I don't know whether it can be done that way. I doubt it but I would agree to it.

The Court: One way you can do it is to dismiss those five and have a superseding information on which they will waive indictment. Then you can consolidate with them and we can go to trial.

Mr. Woodfield: That's the other alternative.

The Court: It's rather informal, but an easier way is to stipulate to the end.

Mr. Goldman: We would object to it, Your Honor, for this reason: by the Government's bringing in this business with the Securities and Exchange Commission, a violation of their rules, that these people were selling securities out

of the scores and scores of customers, we have irrefutable proof that they bought only one thing. Coins, nothing else. They bought no certificates. They bought no stock. They bought bonds. They bought physical things made out of metal for which they paid.

Now, let the Jury hear they are being charged with some erroneous things, it will help us. It's all right for him to bring it in in the first place and cause these people anguish for two years and now to say we will eliminate that? I know that the Court's time is terribly important and I know that Your Honor would like to dismiss these counts, but it seems as if we are rejecting a gift. But, it is not a gift to us. I would prefer that the SEC thing remain there because in the first place if they were found guilty of everything, I don't think and I'm presuming that it would not change the sentence by one iota. It is all one story. But, it is important for the Jury to hear what these people went through when all they did was sell coins and nothing else, like about thirty other concerns or more than that and we have literature they did exactly the same thing and they were not charged with anything.

The Court: You're saying you do not consent and obviously I cannot do it without your consent.

Mr. Goldman: Well, he's Pro Se.

Mr. S. Rauch: I would like to say a couple of words and address most of it to Mr. Goldman. I say this, Sam, that the burden of tackling those additional counts on the law, not so much on the factual basis, but the law itself, the Government is going to try to prove it was a security and it was in the nature of a certificate or stock certificate.

The Court: An investment contract.

Mr. S. Rauch: They're talking about these investment contracts and it is a horse of a different color and I am positive they could not sustain it based upon what I know about the situation. But, what I'm saying to you, Sam, is

His Honor is trying to narrow the issues and if we go to trial on the simple fact of whether there were misrepresentations made, the closer we're getting to narrowing the issues, it will be easier for us to sustain our defense.

Mr. Goldman: Now, Mr. Woodfield stated in the beginning, he kept on using a certain number of words, but it's his privilege. He never used the word purchaser, investor. I want to eliminate that.

Now, if you eliminate the SEC count so as to eliminate the trial, I will follow Mr. Rauch's suggestions, since he's got perhaps more at stake than I have. I don't want to over ride him since he's an attorney. But I don't want the word investment in the indictment. This is a purchase of coins, that's fine. If we can eliminate the SEC and the purchase of coins, I have no objection.

But, if he's going to say investment contract, I don't know what that is. I bought coins myself.

The Court: Unless a contract is a security under the Security's Law.

Mr. Goldman: If we can eliminate those counts—

The Court: I raise the question whether we can modify those counts. I don't know that Mr. Woodfield would agree to strike them from the indictment, but converting them to mail fraud. The question comes to mind isn't mail fraud a lesser included offense? You have an alleged use of the mails? You have an allegation of fraud, such as fraud to a security. Not even if it were a lesser included offense, it doesn't solve any problems.

I suspect going back to our point on the investment, Mr. Goldman, some of the representations that were made were —it will be testified they were using the terms investment and whatever we do the term is not going to stay out of the trial.

Mr. Goldman: Judge, anything besides—other than for a consumption into his body, anything else is for investment.

The Court: That may be.

Mr. Goldman: I still don't understand Your Honor's suggestion. We are just discussing—

The Court: We'll just change counts eleven through fifteen instead of having security fraud we'll change them to mail fraud.

Mr. Goldman: Your duplicating them.

The Court: He says he needs fifteen counts in order to prove his case. Even if I were to strike them he would offer he testimony of the witnesses as similar acts which he would be entitled to do.

Mr. Goldman: What we're doing is eliminating the issue—

The Court: The issue of whether or not what was being done was an investment contract.

Mr. S. Rauch: Your Honor, as a practical matter, the United States—if the United States Attorney agrees, wouldn't it be more profitable, at least to the defense I must say, to eliminate those counts entirely and to permit the U.S. Attorney to introduce all the evidence he would have introduced them on?

The Court: Under the similar acts rule?

Mr. Woodfield: I would object to that, Your Honor. Reluctantly, but I would, I would have to object.

The Court: You think you have a stronger case with fifteen claims than ten?

Mr. Woodfield: That's not my point. But the point is the Government is entitled to proceed on those counts at this point, although there is a question on the issue of securities, whether it is going to delay the proceedings and if we could eliminate these things we could move along. I'm not in a position to just dismiss them and avoid the problem of securities. I'm in full agreement in attempting to change them.

The Court: You'd be willing to do that, if the Defendants agreed to it?

Mr. Woodfield: Yes.

Mr. Goldman: What would it do to our sequence, it doesn't change anything, does it?

The Court: It would change nothing except it would take out of the case the issue of whether there was a selling of coins or investments.

Mr. Goldman: How will that be done, will a new indictment be drawn?

The Court: Mechanically.

Mr. Goldman: Yes?

The Court: I think what we would do is have a partially superseding information as to counts eleven through fifteen, and a waiver of indictment as to those counts and dismiss the underlying counts eleven through fifteen.

Mr. Goldman: Do we have to respond to it?

Mr. S. Rauch: You have to consent to it.

The Court: Only in the sense officially you've got to enter a plea to it.

Mr. Goldman: You mean an arraignment?

The Court: Yes. It can be done at the start of trial. There will be no problem.

Mr. Goldman: Of course not in front of the Jury.

The Court: That's correct. Not in front of the Jury. Also we have a formal waiver of indictment, because they feel it necessary I presume?

Mr. Woodfield: Yes, Your Honor. But, this would be the proceeding. The morning we commence the trial, it will be done out of the presence of the Jury.

Mr. Goldman: Let me address myself to the Judge, no disrespect to you. By waiving any portion of the indictment, I don't know what that does to the defendants' appeal. If we waive it, we can't ever bring it up.

The Court: What you're waiving would be the right to have the mail fraud counts under eleven through fifteen presented to the Grand Jury. You would be consenting to have them prosecuted by way of information rather than indictment. That is all.

Mr. S. Rauch: Is there any essential difference, Sir, in the heart of the last five counts rather than of the first ten counts?

The Court: I don't think so and that's why I made the suggestion. The only difference is it has the additional issue of whether what it is that was being sold here is a security.

Mr. S. Rauch: Yes?

The Court: And it is a nasty issue, I agree with you, Mr. Rauch.

Mr. S. Rauch: God forbid there is a conviction, that thing would wind up three years later in the Supreme Court with untold gray hairs and time and everything if the Government is entitled to get a conviction and they should get it and make it easy for themselves.

The Court: My view is if they can prove everything but the security element they've still proved the mail fraud case. So, why not be happy with that and save everybody's time?

Mr. Goldman: Why not dismiss those five counts?

Mr. S. Rauch: We would consent, whatever the reasons may be, Mr. Woodfield isn't willing to do that. Although he's willing to take out the security aspect.

Mr. Goldman: Is this a final decision by you?

Mr. Woodfield: Yes. I have thought about it and I couldn't dismiss those counts, but I'm willing to transform them into mail counts and eliminate the issue of security. But, I would not consent to any dismissal.

Mr. Goldman: Your Honor, I would like that done as soon as possible and once that is done we have fifteen counts of mail fraud and I also must say I must reserve the De-

fendants' rights to do whatever they think should be done with reference to the counts.

The Court: I don't understand what you mean?

Mr. Goldman: I may want to make a motion to dismiss the counts.

The Court: You've already made such motions and they were denied.

Mr. Goldman: Your Honor, you have five new counts, mail fraud instead of SEC counts.

Now, if they duplicate the first ten, I say now I don't want to—if I'm misleading the Court, I don't know, I haven't studied the problem. I may want to make a motion thereafter to dismiss those counts as being duplicative and redundant and duplicating work that is unnecessary.

The Court: That motion, consider it made now, and I will deny it. Because, they would be duplicative only in the event they repeated the same people and they do not here. I think you are quite right in terms of the overall impact of this case when it comes down to sentencing for example. If there is a finding of guilty, whether it is on one count or five counts or fifteen counts, it possibly isn't going to make much difference as to the final outcome.

Mail fraud cases always seem to come out in a multi-count indictment but it's really essentially a single scheme with some kind of thread of common plan running through it. Otherwise, I guess you don't make out a case.

Mr. Woodfield: That is true, Your Honor.

The Court: You are agreeing then to modify the counts eleven through fifteen and change them to mail fraud?

Mr. S. Rauch: I would ask the U.S. Attorney again to reconsider his position, if possible. I think the whole thing should be a little matter of give and take. We should try to reduce the issues wherever possible with an outright dismissal of the count and with a concession that the evidence which is admitted under those counts would be ad-

mitted. I don't think there will be a consent on it, but I'm thinking of the issues that we have here and this is a proposal for the further elimination of the issues.

Mr. Goldman: I for one don't understand.

Mr. S. Rauch: I think this. I think not only is the last five counts in a very great sense, if not totally—

Mr. Goldman: The Judge just indicated they are other witnesses, but they're making doubly certain.

Mr. S. Rauch: But the Judge and the U.S. Attorney would be permitted to bring the law—to bring in the evidence from those five as being the same type of conduct. So, that actually he would be able to bring in the evidence, he's not precluding himself from introducing any evidence that the Judge thinks—

Mr. Goldman: What are you consenting to?

Mr. S. Rauch: What I'm saying is this. I'll ask the U.S. Attorney again to please reconsider his thought again for the sake of narrowing the issues. Dismiss that entire last five counts and then ask us for some concession and I think we're willing to concede a lot of things.

Mr. Goldman: He wants to bring in those other witnesses.

The Court: He can bring them in anyway.

Mr. S. Rauch: He can bring them in anyway.

The Court: Whether we have the ten counts or fifteen counts.

Mr. Goldman: Why don't you eliminate those five counts, they're only duplicative.

The Court: Up to this point Mr. Woodfield says he doesn't think he can. It's not up to me to comment on the impact or of the Jury of ten or fifteen counts. The U.S. Attorney may think it is impressive.

Mr. Woodfield: It could be, but the point is I really couldn't dismiss those counts.

The Court: So, the answer to your further request, Mr. Rauch, is that he's not willing to do it at this point. But he will eliminate the securities violation change them to mail fraud.

Mr. S. Rauch: I would urge Sam now to go along with that, consent to eliminating the securities part of it and let's try the case on the general mail fraud.

The Court: And change these last five counts to mail fraud counts?

Mr. S. Rauch: Yes, Your Honor.

The Court: Is that agreeable to you?

Mr. S. Rauch: It certainly is.

The Court: Mr. Goldman, is that agreeable to you?

Mr. Goldman: Yes.

The Court: I think, Mr. Woodfield, what you should do is have them retype the indictment.

Mr. Woodfield: Actually the only thing I would be doing, to think out loud, to save time at the end, removing the pages five and six and seven from the indictment. Well, actually I'm sorry. Remove five and six from the indictment and just insert page seven after count ten and we have page five—actually just adding the mail counts from ten on. Is that correct, do you understand what I'm saying?

The Court: No.

Mr. Woodfield: Just eliminating these pages.

The Court: Not quite.

Mr. Woodfield: Bottom of page five and six and just adding what is actually stated on page seven after count ten.

The Court: Because six through ten are receipt through the mail. One through five are sending.

Mr. Woodfield: And eleven through fifteen are sending.

The Court: What you could do very easily would simply be this. Do a superseding information and add after

Appendix E—Minutes of Pretrial Conference in Court's Chambers March 1, 1977.

eleven through fifteen, then stop after the second list. Now, you have six through ten.

Mr. Woodfield: By superseding you mean the whole indictment?

The Court: Put it into one piece of paper.

Mr. Goldman: And call it an information instead of an indictment?

The Court: Correct. You call it a superseding information.

Mr. Goldman: Now you've got me. What happens to the motion to dismiss the indictments?

The Court: You would not be affected by it. It is a formal change only. The motion you made is still directed to the information.

Mr. Goldman: Well, Mr. Rauch Pro Se is right now in the process—in fact, he has a draft. He's in the process of making a motion mainly on one point. That is to dismiss the indictment and I was going to ask you, since normally your Clerk tells me that you hear motions in criminal matters only on the first or third of the month—

The Court: First and third Thursdays.

The Court: How about Mr. Rauch's argument as to the lack of evidence as to his involvement in the situation?

APPENDIX F—Indictment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. *76 CR 308* (T. 18, U.S.C., §§ 1341 and 2; T. 15, U.S.C., §§ 77q(2) and 77x)

4-30-76
Pratt

UNITED STATES OF AMERICA

—against—

SOL RAUCH,
MARC RAUCH,
LAWRENCE CORSA and
MARVIN URBAN, also known as
"Marty Gordon",

Defendants.

THE GRAND JURY CHARGES:

INTRODUCTION

1. At all times material herein, Federal Coin Reserve, Inc. was a corporation organized and existing under the laws of the State of Delaware with offices at 277 Northern Boulevard, Great Neck, New York, and purported to engage in the business of selling rare U. S. coin portfolios.

2. At all times material herein, the defendant Sol Rauch was attorney and advisor to the Federal Coin Reserve, Inc.

3. Commencing in approximately December, 1973, and continuing thereafter at all times material herein, the de-

fendant Marc Rauch was President and co-owner of Federal Coin Reserve, Inc.

4. Commencing in approximately December, 1973, and continuing thereafter at all times material herein, the defendant Lawrence Corsa was Vice President and co-owner of Federal Coin Reserve, Inc.

5. Commencing in approximately January, 1974, and continuing thereafter at all times material herein, the defendant Marvin Urban, also known as "Marty Gordon", was a salesman of Federal Coin Reserve, Inc.

COUNTS ONE THROUGH FIVE

1. Commencing in or about November 1973, and continuing thereafter until at least December 12, 1974, the exact dates being unknown to the grand jury, within the Eastern District of New York and elsewhere, the defendants Sol Rauch, Marc Rauch, Lawrence Corsa and Marvin Urban, also known as "Marty Gordon", did knowingly and wilfully devise and intend to devise a scheme and artifice to defraud prospective purchasers of rare U.S. coin portfolios and to obtain money and property from these purchasers by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false and fraudulent when made, which scheme and artifice is set forth hereinafter.

2. It was a part of the scheme and artifice that advertisements, offering for sale rare *U.S. coin portfolios,* would be and were placed in various newspapers and periodical; throughout the United States, and various television networks to attract potential purchasers.

3. It was a further part of the scheme and artifice that when potential purchasers responded to this approach, and in some instances even when they did not, brochures entitled "The Coin Market and Capi'al Growth", and other promotional materials describing the rare U.S. coin market and describing Federal Coin Reserve, Inc. would be and were mailed to the potential purchasers.

4. It was a further part of the scheme and artifice that a short time after the brochures and other materials had been mailed, the potential customers would be and were telephoned, and specific offers to sell them rare U.S. coins would be and were made to them.

5. It was a further part of the scheme and artifice that during the telephone conversations with the potential customers and in promotional materials mailed to them, among others the following false and fraudulent pretenses, representations, and promises would be and were made, the defendants Sol Rauch, Marc Rauch, Lawrence Corsa and Marvin Urban, also known as "Marty Gordon", well knowing that these pretenses, representations, and promises would be and were false and fraudulent when made:

a) That Federal Coin Reserve, Inc. was a large, established company, which had been in business for many years;

b) That Federal Coin Reserve, Inc., because of its large size, reserve funds available and an inventory of coins, could sell coins at prices lower than other companies;

c) That Federal Coin Reserve, Inc. would repurchase customers' coins for at least the price paid;

d) That coins purchased from Federal Coin Reserve, Inc. were priced at their current market value;

e) That customers would be individually assigned an Investment-Numismatist Account Executive who was a member of the American Numismatic Association;

f) That coin portfolios were assembled by Federal Coin Reserve, Inc.'s numismatic experts and were guaranteed as to their authenticity and grade;

g) That Federal Coin Reserve, Inc. was provided investment expertise and coin portfolio selection expertise by "The Hartford Investment Group", investment consultant experts;

h) That customers would receive their coins within four to six weeks from the date of purchase;

i) That Federal Coin Reserve, Inc. would provide its customers with semi-annual accounting statements of their investments.

6. It was a further part of the scheme and artifice that after the potential purchasers had been induced by the defendants' false and fraudulent pretenses, representations, and promises to order a certain amount of rare U.S. coins, letters and receipt confirmations would be and were sent to them requesting that payment be forwarded to "The Federal Coin Reserve, 277 Northern Boulevard, Great Neck, New York, U.S.A. 11021."

7. It was further part of the scheme and artifice that after monies were received from customers for the purchase of coins, delays would occur in the mailing of coins to the customers, and in many cases customers would never be provided with coins, and the defendants would avoid further contact with these customers.

8. On or about the dates hereinafter set forth, within the Eastern District of New York, for the purpose of executing the scheme and artifice and attempting to do so, the defendants Sol Rauch, Marc Rauch, Lawrence Corsa and Marvin Urban, also known as "Marty Gordon", caused to be placed in post offices and authorized depositories for mail matter in Great Neck, New York, various envelopes containing promotional materials, coins and other information to be sent and delivered by the United States Postal Service as hereinafter set forth:

Count	*Date of Mailing*	*Addressee*
One	March 18, 1974	Dr. Joseph Aquilina 3406 Davenport St. Saginaw, Michigan
Two	August 15, 1974	Dr. Robert E. Fisher 4100 North Harlem Avenue Chicago, Illinois
Three	September 4, 1974	Nancy Spector P.O. Box 2104 Brooklyn, New York
Four	September 27, 1974	Dr. Richard A. Kozal 26 Wildwood Trail Palos Park, Illinois
Five	December 10, 1974	Dr. Efthimios Spyropoulos 535 East 86th Street New York, New York

(Title 18, United States Code, Sections 1341 and 2).

COUNTS SIX THROUGH TEN

1. The Grand Jury incorporates by reference and realleges herein all of the allegations contained in paragraphs 1 through 7 of Counts One through Five of this indictment.

2. On or about the dates hereinafter set forth, within the Eastern District of New York, for the purpose of ex-

ecuting the aforesaid scheme and artifice and attempting to do so, the defendants Sol Rauch, March Rauch, Lawrence Corsa and Marvin Urban, also known as "Marty Gordon", did take and receive and cause to be taken and received from the United States mails various envelopes containing monies which had been delivered by the United States Postal Service addressed to the Federal Coin Reserve, 277 Northern Boulevard, Great Neck, New York from customers as hereinafter set forth:

Count	*Date*	*Sender*	*Amount*
Six	June 24, 1974	Dr. Stanley Deresinski 44 Roosevelt Circle Palo Alto, California	$100
Seven	June 28, 1974	Dr. William Walters 3714 Franklin Street Michigan City, Indiana	$3,100
Eight	August 22, 1974	Richard S. Meyers 308 North Wilshire Lane Arlington Heights, Illinois	$600
Nine	September 3, 1974	Barbara Wisniewski & friend from N.Y. 1490 Francisco St. San Francisco, California	$3,870
Ten	September 30, 1974	Dr. Boone Brackett 1145 West Gate Oak Park, Illinois	$4,000

(Title 18, United States Code, Sections 1341 and 2).

COUNTS ELEVEN THROUGH FIFTEEN

1. Commencing in or about November, 1973, and continuing thereafter until at least December 12, 1974, within the Eastern District of New York and elsewhere, the de-

fendants Sol Rauch, Marc Rauch, Lawrence Corsa and Marvin Urban, also known as "Marty Gordon", knowingly and wilfully, in the offer and sale of securities, to wit, investment contracts in rare coin portfolios, by the use of means and instruments of transportation and communication in interstate commerce and by the use of the mails, directly and indirectly, (a) did employ a device, scheme, and artifice to defraud prospective purchasers of these securities; (b) did obtain money and property from these purchasers by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) did engage in transactions, practices and courses of business which would operate and did operate as a fraud and deceit upon the purchasers of said securities.

2. The allegations contained in paragraphs 2 through 7 of Counts One through Five of this indictment are repeated and realleged as though fully set forth herein, as constituting some of the means by which the violations set forth in paragraph 1 were committed.

3. On or about the dates hereinafter set forth, within the Eastern District of New York, the defendants Sol Rauch, Marc Rauch, Lawrence Corsa and Marvin Urban, also known as "Marty Gordon", for the purpose of furthering the abovestated violations, did cause to be placed in authorized depositories for mail matter envelopes addressed to the Federal Coin Reserve, Inc., 277 Northern Boulevard, Great Neck, New York, containing monies for the purchase of investment interests in rare U. S. coin portfolios, which were sent and delivered by the United States Postal Service to the Federal Coin Reserve, Inc. as hereinafter set forth:

Appendix F—Indictment.

Count	*Date*	*Purchaser*	*Amount*
Eleven	August 19, 1974	Dr. Charles Taborsky 20 South Park Street Madison, Wisconsin	$3,300
Twelve	September 5, 1974	Angelo Pieroni Bellmore, New York	$5,000
Thirteen	October 30, 1974	Dr. Ekkehard Kemmann Brooklyn, New York	$500
Fourteen	November 4, 1974	Dr. Robert R. Abbe Great Lakes, Illinois	$2,000
Fifteen	November 11, 1974	Dr. Seymour Novak Bronx, New York	$3,300

(Title 15, United States Code, Sections 77q(a) and 77x;
Title 18, United States Code, Section 2).

A True Bill

.....
Foreman

David G. Trager
United States Attorney
Eastern District of New York

APPENDIX G—Superseding Information.

UNITED STATES DISTRICT COURT
Eastern District of New York

Cr. No. *76 CR 308(S)* (T. 18, U.S.C. § 1341 and 2)

United States of America

—against—

Sol Rauch,
Marc Rauch,
Lawrence Corsa and
Marvin Urban, also known as
"Marty Gordon",

Defendants.

The United States Attorney Charges:

Introduction

1. At all times material herein, Federal Coin Reserve, Inc. was a corporation organized and existing under the laws of the State of Delaware with offices at 277 Northern Boulevard, Great Neck, New York, and purported to engage in the business of selling rare U.S. coin portfolios.

2. At all times material herein, the defendant Sol Rauch was attorney and advisor to the Federal Reserve, Inc.

3. Commencing in approximately December, 1973, and continuing thereafter at all times material herein, the defendant Marc Rauch was President and co-owner of Federal Coin Reserve, Inc.

4. Commencing in approximately December, 1973, and continuing thereafter at all times material herein, the defendant Lawrence Corsa was Vice-President and co-owner of Federal Coin Reserve, Inc.

5. Commencing in approximately January, 1974, and continuing thereafter at all times material herein, the defendant Marvin Urban, also known as "Marty Gordon", was a salesman of Federal Coin Reserve, Inc.

COUNTS ONE THROUGH FIVE

1. Commencing in or about November 1973, and continuing thereafter until at least December 12, 1974, the exact dates being unknown to the grand jury, within the Eastern District of New York and elsewhere, the defendants Sol Rauch, Marc Rauch, Lawrence Corsa and Marvin Urban, also known as "Marty Gordon", did knowingly and wilfully devise and intend to devise a scheme and artifice to defraud prospective purchasers of rare U.S. coin portfolios and to obtain money and property from these purchasers by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false and fraudulent when made, which scheme and artifice is set forth hereinafter.

2. It was a part of the scheme and artifice that advertisements, offering for sale rare U.S. coin portfolios, would be and were placed in various newspapers and periodicals throughout the United States, and various television networks to attract potential purchasers.

3. It was a further part of the scheme and artifice that when potential purchasers responded to this approach, and

in some instances even when they did not, brochures entitled "The Coin Market and Capital Growth", and other promotional materials describing the rare U.S. coin market and describing Federal Coin Reserve, Inc. would be and were mailed to the potential purchasers.

4. It was a further part of the scheme and artifice that a short time after the brochures and other materials had been mailed, the potential customers would be and were telephoned, and specific offers to sell them rare U.S. coins would be and were made to them.

5. It was a further part of the scheme and artifice that during the telephone conversations with the potential customers, and in promotional materials mailed to them, among others the following false and fraudulent pretenses, representations, and promises would be and were made, the defendants Sol Rauch, Marc Rauch, Lawrence Corsa and Marvin Urban, also known as "Marty Gordon", well knowing that these pretenses, representations, and promises would be and were false and fraudulent when made:

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b) That Federal Coin Reserve, Inc., because of its large size, reserve funds available and an inventory of coins, could sell coins at prices lower than other companies;

c) That Federal Coin Reserve, Inc. would repurchase customers' coins for at least the price paid;

d) That coins purchased from Federal Coin Reserve, Inc. were priced at their current market value;

e) That customers would be individually assigned an Investment-Numismatist Account Executive who was a member of the American Numismatic Association;

f) That coin portfolios were assembled by Federal Coin Reserve, Inc's numismatic experts and were guaranteed as to their authenticity and grade;

g) That Federal Coin Reserve, Inc. was provided investment expertise and coin portfolio selection expertise by "The Hartford Investment Group", investment consultant experts;

h) That customers would receive their coins within four to six weeks from the date of purchase;

i) That Federal Coin Reserve, Inc. would provide its customers with semi-annual accounting statements of their investments.

6. It was a further part of the scheme and artifice that after the potential purchasers had been induced by the defendants' false and fraudulent pretenses, representations, and promises to order a certain amount of rare U.S. coins, letters and receipt confirmations would be and were sent to them requesting that payment be forwarded to "The Federal Coin Reserve, 277 Northern Boulevard, Great Neck, New York, U.S.A. 11021."

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8. On or about the dates hereinafter set forth, within the Eastern District of New York, for the purpose of executing the scheme and artifice and attempting to do so, the defendants Sol Rauch, Marc Rauch, Lawrence Corsa and Marvin Urban, also known as "Marty Gordon", caused to be placed in post offices and authorized depositories for mail matter in Great Neck, New York, various envelopes con-

taining promotional materials, coins and other information to be sent and delivered by the United States Postal Service as hereinafter set forth:

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Five	December 10, 1974	Dr. Efthimios Spyropoulos 535 East 86th Street New York, New York

(Title 18, United States Code, Sections 1341 and 2).

COUNT SIX THROUGH FIFTEEN

1. The Grand Jury incorporates by reference and realleges herein all of the allegations contained in paragraphs 1 through 7 of Counts One through Five of this superseding information.

2. On or about the dates hereinafter set forth, within the Eastern District of New York, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, the defendants Sol Rauch, Marc Rauch, Lawrence Corsa and Marvin Urban, also known as "Marty Gordon", did take and receive and cause to be taken and received from the United States mails various envelopes containing

monies which had been delivered by the United States Postal Service addressed to the Federal Coin Reserve, 277 Northern Boulevard, Great Neck, New York from customers as hereinafter set forth:

Count	*Date*	*Sender*	*Amount*
Six	June 24, 1974	Dr. Stanley Deresinski 44 Roosevelt Circle Palo Alto, California	$100
Seven	June 28, 1974	Dr. William Walters 3714 Franklin Street Michigan City, Indiana	$3,100
Eight	August 22, 1974	Richard S. Myers 308 North Wilshire Lane Arlington Heights, Illinois	$600
Nine	September 3, 1974	Barbara Wisniewski 1490 Francisco Street San Francisco, California	$3,870
Ten	September 30, 1974	Dr. Boone Brackett 1145 West Gate Oak Park, Illinois	$4,000
Eleven	August 19, 1974	Dr. Charles Taborsky 20 South Park Street Madison, Wisconsin	$3,300
Twelve	September 5, 1974	Angelo Pieroni Bellmore, New York	$5,000
Thirteen	October 30, 1974	Dr. Ekkehard Kemmann Brooklyn, New York	$500
Fourteen	November 4, 1974	Dr. Robert R. Abbe Great Lakes, Illinois	$2,000
Fifteen	November 11, 1974	Dr. Seymour Novak Bronx, New York	$3,300

(Title 18, United States Code, Sections 1341 and 2).

DAVID G. TRAGER
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United States Attorney
Eastern District of New York